United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

No. 74-1119

To Be Argued by
Robert Layton

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

AVIS RENT A CAR SYSTEM, INC.,
Plaintiff-Appellee,

vs.

UNITED STATES OF AMERICA,
Defendant-Appellant.

BRIEF FOR PLAINTIFF-APPELLEE

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AVIS RENT A CAR SYSTEM, INC.,
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v.

UNITED STATES OF AMERICA,
Defendant-Appellant

ON APPEAL FROM THE JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

STATEMENT OF THE ISSUE PRESENTED

Was the District Court's finding that car shuttlers utilized by Avis were independent contractors clearly erroneous?

STATEMENT OF THE CASE

This is an appeal from a district court judgment for the taxpayer in a tax refund action brought by Avis Rent A Car System, Inc. ("Avis") to recover payments made on account of amounts assessed by the Internal Revenue Service under the Federal Insurance Contributions Act, Federal Unemployment Tax Act and Federal Withholding Tax for the years 1962, 1963, 1964, 1965 and 1966.[1]

On January 17, 1968 and February 23, 1968, the Commissioner of Internal Revenue assessed tax deficiencies against Avis for the years 1962, 1963, 1964, 1965 and 1966 in the total amounts of $105,733.20 for Federal Insurance Contributions Act ("F.I.C.A.") payments, $6,124.51 for Federal Employment Tax Act ("F.U.T.A.") payments and $199,926.46 for Federal Withholding (collection of income tax at source of wages) ("Withholding") payments.[2]

The basis for the assessments was the claim by the Commissioner that "car shuttlers" utilized by Avis during the tax years in question were employees within the meaning of the Internal Revenue Laws, so that the F.I.C.A., F.U.T.A. and Withholding provisions were applicable to the fees paid to shuttlers by Avis.[3]

On March 26, 1968 Avis paid $31,178.42 with respect to the assessments, such amount constituting a divisible portion of the tax assessed and, on April 3, 1968, timely filed claims for refund of the taxes paid with respect to the assessments and for abatement of the balance of the additional taxes assessed.[4]

By notice dated April 7, 1969 the Internal Revenue Service disallowed in full Avis' claim for refund and abatement of the additional taxes assessed.[5]

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[1] Complaint; I-R. 5-7, "I-R." through "V-R." references are to the five separately bound volumes of the record appendix.

[2] Complaint, para. 5; admitted in Answer, para. 5, I-R. 8.

[3] Complaint, para. 6; admitted in Answer, para. 6, I-R. 8.

[4] Complaint, para. 7 and 8; admitted in Answer, para. 7 and 8, I-R. 8.

[5] Complaint, para. 9; admitted in Answer, para. 9, I-R. 8.

On January 20, 1970 Avis commenced this lawsuit seeking recovery of the amount paid in respect of the deficiency assessments. In its Amended Answer and Counterclaim served on or about January 20, 1973 the Government counterclaimed for the unpaid portion of the Internal Revenue Service assessment.[1]

The case was tried to the district court on July 27, 1973, the parties having waived their rights to a jury. The only evidence offered by the Government at trial was a copy of its revenue ruling, a copy of the standard contract between Avis and shuttlers, plus the joint offering by both parties of the transcripts of the deposition testimony they had taken of some thirty-seven individuals, located throughout various portions of the United States, who had shuttled cars for Avis during the years in issue. Edwin D. Hale, a City Manager employed by Avis, was called to testify at the trial by Avis. Avis also introduced documentary exhibits into evidence as well as the depositions, along with exhibit evidence annexed to the depositions.

In its Findings of Fact, Conclusions of Law and Opinion filed September 27, 1973 the district court held that the car shuttlers were not Avis' employees but were independent contractors.[2] Consequently the court granted Avis' prayer for relief and denied the Government's counterclaim. Judgment was entered on October 3, 1973,[3] and the Government filed its notice of appeal on October 29, 1973.[4]

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[1] Amended Answer and Counterclaim of Defendant; I-R. 8-10.
[2] 364 F.Supp. 605; V-R. 886-907.
[3] V-R. 908.
[4] V-R. 909.

STATEMENT OF FACTS

Avis is a leading car rental company. It operates through many local rental stations located primarily at airports and in business districts inside cities throughout substantial portions of the United States. The business of Avis is the rental of motor vehicles to the public.[1]

As a result of fluctuations in the volume of business among its various stations, shortages and oversupplies of car inventories develop at particular stations.[2] To bring station vehicle inventories back into balance, the need arises on an irregular basis to move automobiles between stations inside cities and airport stations. Car shuttlers move these automobiles.[3]

The need to relocate automobiles is irregular, depending on the weather, holiday travel, the number of rental reservations, and the size of the fleet available. When weekend business drops off no need exists to move cars. Consequently, the number of auto transfers required is not predictable.[4] For this reason, Avis has, for many years, entered into arrangements with car shuttlers who transport automobiles from one station to another.[5]

The individuals who shuttle cars are, generally, employed full-time elsewhere, and often are servicemen, airport personnel or civil servants, all of whom are "moonlighting". Oftentimes housewives or retired policemen or firemen have shuttled cars.[6]

The shuttlers appear at Avis stations when and if they

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[1] V-R. 894.
[2] V-R. 894.
[3] V-R. 895.
[4] V-R. 792.
[5] V-R. 895.
[6] V-R. 807-809.

care to, on days, and at times, when they are interested in working.[1] Avis does not offer shuttling contracts on a seniority—or any other systematic—basis, but rather, distributes these opportunities to shuttle on a "first-come, first-serve" basis.[2]

Upon agreeing to an assignment, the shuttler signs a Vehicle Transfer Contract ("VTC") by the terms of which he agrees to deliver the automobile to the place specified and not to transport any persons or property. The contract recites that the shuttler is not an Avis employee.[3]

The shuttlers agree to render one particular service—the moving of a vehicle from one location to a specified other location. They do not wash cars, change tires, make repairs, rent cars, or perform any of the other functions normally performed by Avis employees.[4]

Avis does not train or instruct shuttlers, either orally or in writing, as to how to perform their shuttling contracts.[5] Avis does not specify what routes are to be followed or within what time period cars are to be delivered.[6] Shuttlers are paid a flat rate per trip, and payment is made, in the great majority of instances, upon delivery of the automobile or within a short time thereafter.[7] They thus have the freedom to perform more trips if they care to and can profit from their own efficiency.

The relationship between Avis and the shuttler terminates at the conclusion of each shuttle movement. Shuttlers have the freedom to and do refuse to accept contracts

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[1] V-R. 809-810.
[2] V-R. 900.
[3] V-R. 895.
[4] V-R. 812-13.
[5] V-R. 802; V-R. 896.
[6] V-R. 896.
[7] V-R. 895.

from Avis.[1] Many car shuttlers perform car shuttling services for Hertz and other direct competitiors of Avis.[2]

Numerous local Avis stations throughout the United States have established the practice of dealing with a "head shuttler" who selects and directs the activities of shuttlers. Such persons in many instances provide services to competitors of Avis and are in business for themselves for the purpose of making a profit on shuttler services.[3] In many of these situations Avis has virtually no contact with the shuttlers at all.[4]

Car shuttlers are not entitled to and never receive vacation pay, overtime pay, sick leave pay, bonuses or any of the other company fringe benefits such as medical, hospital, pension, or profit-sharing plans.[5] Nor is Avis responsible for any personal injuries sustained by shuttlers in the course of moving cars, and this is clearly understood by the shuttlers.[6]

Car shuttlers have never been required to nor have they ever worn Avis uniforms, insignia, or identification cards and while Avis employees, such as rental agents and service agents, have always been required to strictly conform to uniform regulations, as well as regulations concerning personal grooming, hair length, and neatness, no such rules or requirements have ever been applied to car shuttlers.[7]

Car shuttlers are not interviewed, screened, tested or put through any of the normal hiring procedures applicable to Avis' employees.[8]

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[1] V-R. 898.
[2] V-R. 904.
[3] V-R. 898-9.
[4] V-R. 899.
[5] V-R. 898.
[6] V-R. 811.
[7] V-R. 899.
[8] V-R. 900.

Avis has never represented to the shuttlers or to anyone else that they were its employees and the shuttlers themselves understand that they are not Avis employees.[1]

ARGUMENT

I. THE DISTRICT COURT CLEARLY APPLIED THE PROPER RULE OF LAW IN DETERMINING THE STATUS OF SHUTTLERS

The position taken by the Government on this appeal is that while neither the parties nor the court had any difficulty with respect to the applicable law below, now that the facts have been found against the Government, somehow an incorrect legal standard was applied by the district court. That simply is not this case.

The court below correctly and succinctly stated the statutory and regulatory standards applicable in determining the independent contractor-employee question (364 F.Supp. 608-609). It noted the test which obtains in this Circuit and indicated that the determination to be made was not governed by the presence or absence of any one single factor but by an overall view of an entire fact pattern (364 F.Supp. at 609). There is no doubt that the district court correctly set forth the proper rule of law in determining the status of the shuttlers.

Sections 3101 and 3111 of the Internal Revenue Code of 1954[2] impose a tax on "employees" and "employers" respectively under the F.I.C.A.

Section 3102 provides for the deduction from wages and direct payment of the employee's portion of the tax by the employer. Section 3121(d) defines an employee as:

"(2) any individual who, under the usual common

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[1] V-R. 902.

[2] All section references are to the Internal Revenue Code of 1954, Title 26, United States Code.

> law rules applicable in determining the employer-employee relationship, has the status of an employee. . .''

Section 3301 imposes a tax under the F.U.T.A. on employers with respect to individuals in their employ. Section 3306(i) defines the term ''employee'' as including ''an officer of a corporation'' and excluding:

> ''(1) any individual who, under the usual common law rules applicable in determining the employer-employee relationship has the status of an independent contractor, or
>
> ''(2) any individual (except an officer of a corporation) who is not an employee under such common law rules.''

Section 3402 requires every employer to withhold a specified percentage of income from wages paid to his employees. Section 3401(c) defines the term ''employee'' as including:

> ''. . . an officer, employee or elected official of the United States . . . [and] an officer of a corporation.''

The Treasury Department has promulgated regulations under each of these sections interpreting the statutory terms ''employee''. Treas. Regs. 31-3121(d)-1; 31-3306(i)-1; 31-3401(c)-1. All of the regulations are similar in scope and meaning in adopting and elaborating the common law test, and each contains substantially the same statement of the appropriate analysis in close cases:

> ''Whether the relationship of employer and employee exists under the usual common law rules will in doubtful cases be determined upon an examination of the particular facts of each case.''

The employee-independent contractor distinction under the tax laws has been heavily litigated for almost forty years. After a number of changes of administrative, judicial, and legislative direction, and after considerable confusion, the interpretive content of the standard has stabilized within the last ten years.

It is now clear that the identification of an employer-employee relationship under the federal tax laws is precisely the same exercise as identifying such relationship for other purposes at common law (*e.g.*, for purposes of responding to tort claims). See *e.g., Lifetime Siding, Inc.* v. *U.S.*, 359 F.2d 657 (2d Cir. 1966), *cert. den.* 385 U.S. 921 (1966).

The fundamental question in each such situation is whether the individual commits himself to the service of another—to be instructed, directed and supervised in the performance of such tasks as the other may set—or whether the individual is retained to accomplish some agreed upon job with such resources as are available to him, and in such manner as he chooses.

The existence of an employment rather than an independent contractor relationship is associated with regularity, stability, and continuity of the relationship which justify a degree of mutual reliance between the parties as well as the imposition by the State (through such instrumentalities as tort doctrine and the tax statutes) of certain obligations and liabilities upon the employer. When faced with the task of characterizing a particular relationship, the courts have examined a variety of indices in order to determine whether the imposition of the liability or obligation in question is justified by the quality of the relationship. See Restatement of the Law, *Agency* 2d, Section 220.

The proper analytical approach to these cases has been well-stated by the Court of Claims in *Illinois Tri-Seal Products, Inc.* v. *U.S.*, 353 F.2d 216 (Ct. Cl. 1965):

"The problem here is to determine, on the basis of the above facts, whether or not the installers were employees within the meaning of sections 3121(d)(2) and 3306(i) of the 1954 Code, both of which 'specifically adopt the common-law test for ascertaining the existence of the employer-employee relationship.' *Enochs* v. *Williams Packing & Nav. Co.*, 370 U.S. 1 (1962). *Id.* at 223.

* * *

"The conclusion to be drawn from the foregoing [examination of legislative and judicial history of the sections] is that the existence or absence of an employment relationship is to be ascertained not by use of the economic reality test but by applying the common-law rules realistically. That is to say, the end-point determination—whether the person for whom the services are performed is an 'employer' within the common-law meaning of that term—must be made on the basis of actual reality by looking to the substance of the arrangement and giving weight to all relevant factors. Pertinent in making the determination are such factors as: degrees or extent of control which the principal may exercise over the details of the work; whether or not the principal has the right to discharge the individual; opportunity of the individual for profit and loss; investment by the individual in the tools and facilities for work; whether the individual or the principal supplies the tools and places to work; the degree of skill required in the particular occupation; the permanency and length of time the individual is engaged; the method of payment (whether by time or job); whether the work is part of the employer's regular business; and whether the parties believe they are creating an employer-employee relationship or a principal-independent contractor relationship." *Id.* at 228.

"[N]o one factor is controlling nor are these factors exclusive. The relationship is to be ascertained by

> an over-all view of the entire situation, not by any rule of thumb, or by the presence or absence of a single factor. The result of each case must be governed by the special facts and circumstances of the case itself." *Id.* at 229.

The opinion below makes it clear that the district court adhered strictly to this standard.[1] The district judge carefully examined the Avis-car shuttler relationship from a large variety of perspectives and, based upon this examination, set forth his evaluation of a large number of the factors to which the case law directed his attention.

On the "control" or "right to control" factor, the court found the evidence inconclusive[2] as it did with respect to the factor relating to Avis' ability or lack of ability to discharge shuttlers. The court rejected both Avis' argument that it could not and did not discharge shuttlers and the Government's argument that Avis could and did exercise such power to discharge.[3]

However, with respect to the other factors evaluated—all of which have been deemed relevant in other cases—the court found that the evidence pointed sharply toward independent contractor status.

Thus the district court found that the relationship was impermanent, with shuttlers performing their tasks on a job-to-job basis and rejecting proferred assignments at will and without fear of recrimination;[4] that ". . . 'Shuttlers' were not entitled to, and did not receive vacation pay, over-

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[1] The district court's discussion of the appropriate standard to apply appears at V-R. 890-94. The court's statement of where the burden of proof lay is found at V-R. 895-96.

[2] V-R. 896-897.

[3] V-R. 904.

[4] V-R. 898; See *Silver* v. *U.S.*, 131 F.Supp. 209, 212 (N.D.N.Y. 1954), *Farm & Home Modernization Corp.* v. *U.S.*, 138 F.Supp. 423, 425 (N.D.N.Y. 1956).

time pay, sick leave pay, bonuses or any other fringe benefits—benefits that are received by Avis' employees";[1] that often Avis dealt with "head shuttlers" who recruited and selected the individual shuttlers and in such situations Avis often had no contact with the individual shuttlers;[2] that these "head shuttlers" were on occasion in business for themselves and provided shuttling services to Hertz, Budget, Airways, all competitors of Avis;[3] that shuttling work was handed out on a "first-come, first-serve" basis, without regard to any kind of a routinized seniority system.[4]

The court further found that in contradistinction to Avis' practice with respect to its employees, Avis did not follow an established pattern of interviewing or screening prospective shuttlers. The employment applications required of, and the employment examinations administered to, prospective employees were never utilized with shuttlers.[5]

The court found that it was the manifested view of both Avis *and the shuttlers* that the shuttlers were independent contractors.[6] Thus Avis carried no workman's compensation insurance for the shuttlers, and the Vehicle Transfer Contract entered into prior to each shuttling engagement provided that:

> "It is agreed that this contract in no way constitutes the contractor as an agent or employee of the owner of the said vehicle or of Avis Rent Car Sys-

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[1] V-R. 898; See *Lifetime Siding, Inc.* v. *U.S.*, 359 F.2d 657, 659 (2d Cir. 1966), *cert. den.* 385 U.S. 921 (1966); *William C. McCombs Co.* v. *U.S.*, 436 F.2d 979, 982 (Ct. Cl. 1971).

[2] V-R. 898-899; See *Bonney Motor Express, Inc.* v. *U.S.*, 206 F.Supp. 22, 24 (E.D. Va. 1962).

[3] III-R. 412-413; 432-434.

[4] V-R. 900.

[5] V-R. 900-901.

[6] V-R. 902; See *Illinois Tri-Seal Products, Inc.* v. *U.S.*, 353 F.2d 216 (Ct. Cl. 1965); *Allstate Ins. Co.* v. *Hill*, 378 F.2d 112, 117 (6th Cir. 1967).

tem, its members or licensor or licensor's subsidiaries.''[1]

Most significantly, the district court found that shuttlers not only had the right to, but did in fact, shuttle cars for competitor car rental agencies—Hertz, National, Budget, etc.[2] Indeed the business records of King Transport Company, introduced in evidence,[3] reflected performance of shuttling services at a profit for both Hertz and Budget as well as Avis.

Airline personnel, who shuttled as an additional occupation, rendered identical service simultaneously to Hertz and National.[4] Surely no taxpayer even colorably dealing with alleged ''employees'' would permit them to perform services for his business competitors at the very same time they rendered service to him. Housewives who were members of the Mormon Church in Riverside, California, drove cars through their Bishop, who acted as a ''head shuttler,'' and donated their car moving fees to the church building fund.[5] It could not be seriously contended that the housewives were Avis employees.

Weighing the various factors in their totality, the district court concluded that the shuttlers were independent contractors—that they had an independence of Avis ''that greatly transcends any degree of freedom ordinarily exhibited by an employee.''[6]

Notwithstanding the district court's systematic canvassing of relevant factors, and its ultimate balancing of these

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[1] V-R. 902.

[2] II-R. 332-333, 344; V-R. 904; See *Illinois Tri-Seal Products, Inc.* v. *U.S., supra* at 229; *Powers* v. *U.S.*, 424 F.2d 593, 599 (Ct. Cl. 1970).

[3] Pl. Ex. 2, V-R. 830-834; Pl. Ex. 4, V-R. 836-870.

[4] II-R. 318.

[5] IV-R. 715, 725.

[6] V-R. 904-905.

factors, it is ostensibly the Government's position on this appeal that the court applied the wrong rule of law. It is the Government's position that the district court, having found as it did with respect to the control and discharge factors, was, *as a matter of law,* compelled to find for the Government, and was not free to weigh all of the various factors it did weigh in reaching its determination.[1]

It is plain that the Government is both wrong in stating the applicable rule of law as well as in asserting that the court below did not correctly apply the facts it found to the applicable rule of law.

In *U.S.* v. *Silk,* 331 U.S. 704 (1947), upon whose precedential value the Government relies almost exclusively, the Supreme Court stated, after listing a number of factors to be considered in determining status, that

> "[n]o one is controlling nor is the list complete." *Id.* at 716.

The Government's characterization notwithstanding, the facts in the instant case are not "strikingly identical" to the facts in *U.S.* v. *Silk.*[2] Unlike Silk's coal unloaders, who worked exclusively on their employer's premises and within his sight so that "Silk was in a position to exercise all necessary supervision over their simple tasks,"[3] the shuttlers performed their tasks away from Avis' stations, and out of the range of any Avis employee who might provide supervision or control. While the work of the unloaders in removing coal from railroad cars so that it could be shipped to Silk's retail customers was an essential and "an integral part of the [business] of retailing coal,"[4] the irregular shuttling of cars is only incidental to Avis' business of renting automobiles to the public. While the evidence established the existence of a primary dependency by many of the coal unloaders on their work for Silk for their eco-

[1] Brief of Appellant, p. 22.
[2] Brief of Appellant, p. 15.
[3] 331 U.S. at 718.
[4] *Id.* at 716.

nomic livelihood,[1] typically shuttlers worked for Avis part-time, sporadically, and to supplement income from regular employment elsewhere. Avis used "head shuttlers", some of whom ran their own business of shuttling at a profit, and the shuttlers themselves worked directly for Avis' principal competitors. The district court considered a large number of factors in arriving at its determination, as is the proper procedure.

The multi-factored nature of the analysis has been emphasized by the courts time and again in the twenty-five years since *Silk*,[2] and has been explicitly approved by this court in *Lifetime Siding, Inc.* v. *U.S.*:

> "The district court enumerated some 18 relevant factors which the jury might take into account in applying the test it prescribed to determine the status of the applicators, *emphasizing that no single factor was determinative.* We hold that the district court was correct in so instructing the jury." 359 F.2d 657 (2d Cir. 1966). (italics supplied)

The Supreme Court denied certiorari in *Lifetime Siding.* 358 U.S. 921 (1966).

The Government's attempt to reduce the analytical model to one containing just two factors may be useful to its position in the instant case (having had most other factors decided against it), but it is contrary to established precedent. The district court, however, understood the proper standard, and correctly applied it.

II. THE FINDINGS OF THE DISTRICT COURT ARE FULLY SUPPORTED BY THE RECORD

With the correct legal standard clearly in mind ("the test which this court shall utilize in determining whether

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[1] *Id.* at 706.

[2] The Government also fails to note that *Silk* put forward the 'economic reality' test amended by Congress in 1948 (P.L. 642, 80th Cong. 2d Sess.) in favor of a realistic application of the common law rules regarding the employer-employee relationship. See *Ringling Bros.-Barnum & Bailey Cir. Shows* v. *Higgins,* 189 F.2d 865, at 867-869, 870-71 (2d Cir. 1951).

'car shuttlers' are 'employees,' or 'independent contractors,' is the 'common law applicable in tort actions under the doctrine of *respondeat superior*' '')[1] the district court examined the shuttlers' role and relationship to Avis from a variety of viewpoints, and made the specific factual findings mandated by the precedents.

While the district court rejected certain of Avis' arguments[2] and found the evidence inconclusive with respect to several of the factors enumerated in the Treasury Regulations and the cases,[3] it found that the evidence with respect to most of the relevant factors indicated the existence of independent contractor rather than employee status. Because the Government consciously does *not* challenge the accuracy of these findings, or the sufficiency of the evidence to support them, we will not here elaborate their evidentiary basis in detail. Rather, we simply set forth the findings, as made by the court, noting the relevant record citations which underlie each.

> " '*Car shuttlers' performed their tasks on a job-to-job basis, and they could reject assignments they deemed unsuitable without fear of recrimination.*'"[4]

Evidentiary support in the record for this finding is found at IV-R. 693, IV-R. 609, I-R. 160, IV-R. 716, V-R. 805-806.

> "...'*shuttlers were not entitled to, and did not receive vacation pay, overtime pay, sick leave pay, bonuses or any other fringe benefits . . .*' [*R*]*egular employees' of AVIS received, and do receive, such benefits...*'"[5]

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[1] V-R. 893.
[2] See, *e.g.*, V-R. 897, 901.
[3] See, *e.g.*, V-R. 904.
[4] V-R. 898.
[5] V-R. 898.

Evidentiary support in the record for this finding is found at I-R. 30, III-R. 428, IV-R. 670, II-R. 376, I-R. 184, II-R. 222, V-R. 811-812.

> "*In many instances, AVIS dealt with 'head shuttlers' who made it their business to select individual 'shuttlers.' On many of these occasions, AVIS had no contact with the individual 'shuttlers'.*"[1]

Evidentiary support in the record for this finding is found at III-R. 383-84, 387, II-R. 352, 355, III-R. 413-14, 419-20, 433-34, V-R. 802-804, V-R. 828-70.

> "[*There is no*] *seniority system among these individuals since work assignments were handed out on a 'first-come, first-serve' basis.*"[2]

Evidentiary support in the record for this finding is found at II-R. 376-77, IV-R. 689, I-R. 30, V-R. 810.

> "*. . . AVIS did not follow an established pattern of interviewing or screening prospective 'shuttlers' . . . This lack of a procedure to sift out potentially 'poor' 'car shuttlers' may be compared with the screening process AVIS utilizes when it hires new 'regular employees.' An Application for Employment must be filled out in detail by the prospective employee, and a written Employment Test must be passed by all such applicants. 'Shuttlers,' however, ordinarily had to present nothing more than a driver's license in order to move a car . . .*"[3]

Evidentiary support in the record for this finding is found at V-R. 792-95, V-R. 874-79, I-R. 72, I-R. 178.

> "*. . .* [*N*]*o workman's compensation insurance of any kind was carried on the 'shuttlers,' . . . and this is evi-*

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[1] V-R. 898-9.
[2] V-R. 900.
[3] V-R. 900-1.

dence, in the very least, that these men were not looked upon as employees by Avis . . . Moreover, it seems clear that all of plaintiff's actions were pointed so as to indicate its own viewpoint that the 'shuttlers' were independent contractors. In a similar vein, there is evidence that the 'shuttlers' thought of themselves as independent contractors . . .'[1]

Evidentiary support in the record for this finding is found at V-R. 835, III-R. 391, IV-R. 645, V-R. 812.

"*. . . these 'car shuttlers' had the right to work for other rental agencies, including the competitors of AVIS, and indeed did so . . .*"[2]

Evidentiary support in the record for this finding is found at III-R. 413, II-R. 318, 332-333, 344, IV-R. 593-94, IV-R. 626, II-R. 344, V-R. 806-07.

The factors set forth above are those which the district court viewed as favorable to Avis' position, and upon which it relied in determining that the shuttlers were independent contractors rather than employees.

Avis believed that there was other evidence indicative of independent contractor status—evidence, for example, that unlike Avis' employees, shuttlers received no training, supervision or instruction as to how to perform their contracts,[3] were not required to wear uniforms (or even "We Try Harder" buttons) or to comply with grooming regulations,[4] and that most shuttlers held regular employment elsewhere or were self-employed.[5] The district court found this evidence inconclusive, and declined to rely on it. Similarly, the Government stressed the importance of cer-

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[1] V-R. 902.
[2] V-R. 904.
[3] V-R. 802, 896.
[4] V-R. 899.
[5] V-R. 807-809.

tain other evidence, which the district court found unpersuasive.[1]

While reasonable men might differ about specific findings made by the district court, it is clear the findings it made are amply supported by the record, and taken in total can by no standard be said to be clearly erroneous. *Commissioner of Internal Revenue* v. *Duberstein,* 363 U.S. 278, 291 (1960).

III. AS THE DISTRICT COURT'S FINDINGS WITH RESPECT TO THE STATUS OF THE SHUTTLERS WERE NOT CLEARLY ERRONEOUS, THE JUDGMENT OF THE DISTRICT COURT MUST BE AFFIRMED

As demonstrated in the preceding section of this brief, the district court's findings with respect to the function, duties and status of the car shuttlers are fully supported by the record. Indeed, the Government does not quarrel with any of the district court's findings, at various points cites specific findings with approval,[2] and characterizes the facts found by the district court as "substantially undisputed".[3]

It is submitted that once it is established that the district court's findings were not clearly erroneous, affirmance of that court's judgment must follow.

The Supreme Court has held that certain tax law issues are essentially factual in nature; that in such cases the proper decision-making process requires an examination by the trier of fact of the specific factual circumstances involved; and that appellate review of such decisions is consequently restricted. *Commissioner of Internal Revenue* v. *Duberstein.*[4]

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[1] 364 F.Supp. at 613.
[2] Brief of Appellant pp. 21, 22.
[3] Brief of Appellant p. 2.
[4] 363 U.S. 278 (1960).

". . . Decision of the issue presented in these cases must be based ultimately on the application of the fact-finding tribunal's experience with the mainsprings of human conduct to the totality of the facts of each case. The nontechnical nature of the statutory standard, the close relationship of it to the data of practical human experience, and the multiplicity of relevant factual elements, with their various combinations, creating the necessity of ascribing the proper force to each, confirm us in our conclusion that primary weight in this area must be given to the conclusions of the trier of fact. *Baker* v. *Texas & Pacific R. Co.*, 359 U.S. 227; *Commissioner* v. *Heininger*, 320 U.S. 467, 475; *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 341; *Bogardus* v. *Commissioner, supra,* at 45 (dissenting opinion)."

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"One consequence of this is that appellate review of determinations in this field must be quite restricted. Where a jury has tried the matter upon correct instructions, the only inquiry is whether it cannot be said that reasonable men could reach differing conclusions on the issue. *Baker* v. *Texas & Pacific R. Co., supra,* at 228. Where the trial has been by a judge without a jury, the judge's findings must stand unless 'clearly erroneous.' Fed. Rules Civ. Proc., 52(a) . . ." *Commissioner of Internal Revenue* v. *Duberstein*, 363 U.S. 278, 289, 290-91 (1960).

The *Duberstein* rule limiting the scope of appellate review has been explicitly—and properly—applied to district court determinations of employee versus independent contractor status.[1]

[1] The Supreme Court's citation of *Baker* v. *Texas & Pacific R. Co.*, 359 U.S. 227 (1959) in *Duberstein* makes it clear that the employee-independent contractor determination was one of the very situations that the Supreme Court had in mind in enunciating its rule.

> "The determination of an individual's status as an employee or an independent contractor is one of fact. *Baker* v. *Texas & P. R. Co.*, 359 U.S. 227 (1959). Where, as here, the trial has been by the court sitting without a jury, the familiar rule that the court's findings must stand unless clearly erroneous applies . . ." *McGuire* v. *U. S.*, 349 F.2d 644 (9th Cir. 1965).

See, also, *Service Trucking Co., Inc.* v. *U. S.*, 347 F.2d 671 (4th Cir. 1965); *Lanigan Storage & Van Company* v. *U. S.*, 389 F.2d 337 (6th Cir. 1968); *American Consulting Corp.* v. *U. S.*, 454 F.2d 473 (3d Cir. 1971); *U. S.* v. *Crawford Packing Company,* 330 F.2d 194 (5th Cir. 1964).

The teaching of *Duberstein* has been followed by this court in reviewing findings of the court below where ". . . the record would also have supported a contrary view." *Bessenyey* v. *C.I.R.*, 379 F.2d 252, 257 (1967). In this case there were no findings below in favor of the Government sufficient to support a contrary view.

In any event it is beyond doubt that the claim that one or two factors determine the employer-employee relationship has been rejected by this court. This court, in approving the multi-factor approach to the determination of employee or independent contractor status, has recognized that the determination of overall status is properly one for the trier of fact based upon a number of factors, some of which point in one direction, some in another, and some of which may be neutral. *Lifetime Siding, Inc.* v. *U. S.*, 359 F.2d 657 (2d Cir. 1966) *cert. den.*, 385 U.S. 921 (1966).

Indicative of the restricted standard of review which this court has applied in these status cases is the fact that it appears *never* to have reversed the determination of a district court in such a case. *Texas Co.* v. *Higgins,* 118 F.2d 636 (2d Cir. 1941) (judgment for taxpayer affirmed); *Radio City Music Hall Corp.* v. *U. S.*, 135 F.2d 715 (2d

Cir. 1943) (judgment for taxpayer affirmed); *McGowan* v. *Lazeroff*, 148 F.2d 512 (2d Cir. 1945) (judgment for taxpayer affirmed); *Ringling Bros.-Barnum & Bailey Cir. Shows* v. *Higgins*, 189 F.2d 865 (2d Cir. 1951) (judgment for Government affirmed); *Zipser* v. *Ewing*, 197 F.2d 728 (2d Cir. 1952) (judgment for taxpayer affirmed); *Ben* v. *U. S.*, 241 F.2d 127 (2d Cir. 1957) (judgment for Government affirmed); *Lifetime Siding, Inc.* v. *U. S.*, 359 F.2d 657 (2d Cir. 1966), *cert. den.* 385 U.S. 921 (1966) (judgment for Government affirmed).

There is nothing unusual, much less unique, in the instant case which would warrant overriding the findings of the district court. There is no question that the court set forth the applicable legal standard, had that proper legal standard clearly in mind, and made detailed factual findings that are fully supported by the record.

That the court in weighing the totality of its factual findings—most of which were in taxpayer's favor—applied them to the overall relationship and concluded that shuttlers were not employees for purposes of federal employment taxes may be a disappointment to the Government, but is no different than its receiving an adverse verdict from a jury. The trier of fact applies human experience to the totality of the facts, including inferences to be drawn from undisputed facts, in order to reach an ultimate conclusion. Having been arrived at conscientiously, such a conclusion by a district judge is not to be lightly upset. *Bessenyey* v. *C.I.R.*, *supra*, at 257.

CONCLUSION

The Government has demonstrated no basis for questioning either the facts found below, the law applied to those facts, or the ultimate conclusion arrived at below.

The judgment of the district court should be affirmed.

Respectfully submitted,

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